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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight Newspapers, Inc., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF THE WASHINGTON POST COMPANY, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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November 1, 1973

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Tornillo, Jr. v. The Miami Herald

Dear Mr. Cooper:

In response to your request, pursuant to Rule 42(1) of the Rules of the United States Supreme Court, on behalf of The Miami Herald, we hereby consent to the filing in that Court of an Amicus Curiae Brief in this case by the Washington Post Company.

Sincerely,

James W. Beasley

JWB:mh

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November 19, 1973

Richard Cooper, Esq.
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Re: Tornillo v. Miami Herald

Dear Mr. Cooper:

As counsel for the above captioned respondent, you are hereby given permission to file your brief amicus curiae on behalf of the Washington Post in the above captioned matter.

Very truly yours,

TOBIAS SIMON

TS:kk

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BRIEF OF THE WASHINGTON POST COMPANY, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

STATEMENT

The Washington Post Company, a Delaware corporation, submits this brief as amicus curiae in support of the appellant's jurisdictional statement, pursuant to Rule 42 of the Rules of this Court upon the written consent of both parties to this action. Copies of letters of consent from both parties have been filed with the Clerk. Amicus urges this Court to note probable jurisdiction because amicus believes that the statute upheld by the decision of the Florida

Supreme Court below is an unconstitutional direct attack on the freedom of the press.

INTEREST OF THE AMICUS

The Washington Post Company is the publisher of *The Washington Post*, a daily newspaper, published in the Nation's capital. In addition, The Washington Post Company is the parent of subsidiary corporations including Post-Newsweek stations which operate WPLG-TV in Miami, Florida and WJXT-TV in Jacksonville, Florida. The Washington Post Company through a subsidiary also publishes *Newsweek*, a nationally and internationally distributed news magazine.

ARGUMENT

I. THE DECISION BELOW HOLDING FLORIDA STATUTE § 104.38 CONSTITUTIONAL IS UNPRECEDENTED AND CONTRARY TO SETTLED AUTHORITY.

A. The Decision Below Is Contrary to Prior Decisions of This Court.

Florida statute § 104.38 requires a newspaper which in its columns "assails" the character or attacks the official record of any candidate for public office to make available to the candidate free equal space for reply.[1] The Florida statute upheld below by the

[1] Fla. Stat. § 104.38 provides: If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree . . .

Supreme Court of Florida entitles a candidate for any public office to equal space to reply to any criticism in a newspaper, regardless of its truth or fairness and regardless of the context in which it appears. The Florida Supreme Court in upholding the constitutionality of Florida statute section 104.38 has ruled that the First Amendment permits a state to dictate to the press what it must print in its news, editorial and other columns. The entire constitutional jurisprudence of this Court contains no precedent for such a direct governmental intrusion upon the editorial freedom of a newspaper.

In holding that the Florida statute promotes the First Amendment's interest in ensuring that the public be fully informed, the Florida court ignored the well-established principle that the First Amendment prohibits government from being the arbiter of what the public shall read. As this Court has repeatedly emphasized, the predominant purpose of the First Amendment is "to preserve an untrammeled press" as "one of the great interpreters between the government and the people." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, ——— U.S. ———, 37 L.Ed.2d. 669 (1973).

The decision below is directly contrary to *New York Times Co.* v. *Sullivan, supra,* which recognized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S., at 270.

Apart from direct governmental censorship of the sort attempted in *Near* v. *Minnesota,* 283 U.S. 697 (1931), and *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), nothing could be better calculated than § 104.38 to make discussion of candidates in the press "cabin'd, cribb'd, confined, bound in to saucy doubts and fears." W. Shakespeare, *Macbeth,* Act III, Scene 4, ll. 23-24. Libel judgments and discriminatory taxes involve only money. Section 104.38 requires the editors of a newspaper to surrender something much more precious—their editorial judgment as to what should be printed in their publication; it even prescribes the type to be set and the section of the newspaper in which these governmentally mandated articles must appear. For every vehement, caustic or unpleasantly sharp attack on a candidate for public office, including a public official seeking re-election, a newspaper will pay a price—in money (for it must provide space *without compensation*) and, more importantly, in the editorial integrity of its publication. Under the statute upheld below, this price must be paid even if the attack is true, fair, objective, moderate, balanced and wholly factual. The impact of section 104.38 on freedom of the press can be seen by considering the effect the statute would have had if during the reporting on the Watergate scandals Mr. Nixon had been entitled to equal (and equally prominent) space on the front page and editorial page of *The Washington Post.* Any newspaper worthy of the First Amendment trust vested in it by the Founding Fathers will think twice before opening its pages to an invasion of self-serving press releases.

In sum, the effect of the Florida statute is to disturb the delicate balance between an independent press and

the co-equal branches of government, which has always been preserved by this Court. It is crucial to maintain this balance so that the press can continue to perform its two vital functions as critical evaluator of official conduct and independent arbiter of the newsworthiness of daily events. By intruding upon the exercise of these functions by the press, section 104.38 will turn every candidate for public office into his own reporter and editor with mass circulation and distribution guaranteed.

The court below also erred by applying to the print media the standards which this Court enunciated in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969) with respect to the governmentally regulated and technologically limited electronic media. The Florida Supreme Court completely disregarded the repeated statements by this Court that the unique characteristics which distinguish the broadcast media from the print media "justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 386. As Mr. Chief Justice Burger stated only last Term in *Columbia Broadcasting System* v. *Democratic Nat'l Comm.,* 412 U.S. 94, 117-18 (1973):

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. . . . A[broadcast] licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'"

B. The Decision Below Conflicts with the Rulings of Other Courts.

Mississippi, the only other state that today has a right of reply statute,[2] has narrowly construed the statute's application. Although the Mississippi statute in terms affords a right of reply to any newspaper story reflecting on "honesty, integrity, or moral character," the Mississippi Supreme Court has ruled that that State's right of reply statute applies only to statements proven to be libelous. *Manasco* v. *Walley*, 63 So. 2d 91 (Miss. 1953). No such limitation applies to the statute upheld by the decision below. Libel was neither alleged in the complaint nor considered by the Florida Supreme Court. Once a newspaper has published an article reflecting adversely on a candidate, the Florida Supreme Court has held that the Florida statute gives the candidate equal space for a reply.

The decision below cannot be reconciled with the line of cases holding that the First Amendment prohibits courts and legislatures from requiring newspapers and other print media to publish particular articles, *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), or paid political or other advertising, *Chicago Joint Board ACWA* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971).

In a recent advisory opinion to the state legislature, the Supreme Judicial Court of Massachusetts found unconstitutional a proposed statute requiring that a newspaper publish paid answers to political advertisements. The Massachusetts court concluded that requir-

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[2] Miss. Code Ann. § 23.3.25.

ing a newspaper to print is equivalent to censorship, and that the statute would have a chilling effect on the press, discouraging it from publishing any political advertising. *Opinion of the Justices,* 298 N.E.2d 829 (Mass. 1973). The same logic applies *a fortiori* to the Florida statute, which regulates a newspaper's editorial and news coverage.

II. FLORIDA STATUTE § 104.38 IS AN UNCONSTITUTIONAL ABRIDGMENT OF THE FREEDOM OF THE PRESS.

A. The First Amendment Protects the Freedom of the Press To Print Political Information and Comment Without Governmental Interference or Penalty.

The freedom of the press guaranteed by the First Amendment "was designed to serve as a powerful antidote to any abuses of power by governmental officials" and as a "means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills* v. *Alabama, supra,* at 219; *Near* v. *Minnesota, supra.* The basic premise was laid down by James Madison:

> "[T]he press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press." *Report on the Virginia Resolutions,* 4 Madison's Works 544.

Political comments lose the protection of the First Amendment only when they are false and are made either with knowledge that they are false or with reckless disregard of whether they are true or false. *New*

York Times Co. v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). The Florida statute, however, imposes sanctions on a newspaper for publishing protected speech. The statute commandeers free space in a newspaper for a candidate's reply to any statement, whether true or not. For this reason, the Florida statute is quite different from libel retraction statutes, which give newspapers the option of limiting damages by printing a retraction after it has been shown that a defamatory falsehood was published with actual malice.[3] Note, *Vindication of the Reputation of a Public Official,* 80 Harv. L. Rev. 1730, 1740 (1967).

State interference with the freedom of the press cannot be justified as promoting the public's right to know. The First Amendment does not rest on the theory that each newspaper must present a balanced view of every issue, but rather on the principle that dissemination of information should come from diverse and antagonistic sources. *Associated Press* v. *United States,* 326 U.S. 1 (1945). Nor does a state's interest in affording the electorate an opportunity to consider both sides of an issue permit statutes which "muzzle" the press. *Mills* v. *Alabama, supra.*

A newspaper's constitutionally protected function is not to provide a public forum for the airing of all views. Each newspaper is one component in the *system* of freedom of expression, which embraces *many* important outlets for information and opinion. The philosophy of the Founding Fathers was that the public could best be informed by establishing a system of free

[3] For this reason the reliance of the court below on a footnote in the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 47 n.15 (1971), is entirely misplaced.

expression, not by allowing government to tell individual newspapers what to print.

Just last Term, this Court reaffirmed its adherence to the principle that government may not interfere with the journalistic integrity of a newspaper in determining the coverage to be given to issues of public importance:

> "Nor, *a fortiori,* does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors . . . [W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* at———, 680.

B. A Statute Which Imposes a Duty To Publish Abridges the Freedom of the Press.

The fact that the Florida statute takes the form of an obligation to print rather than a prohibition against printing does not lessen its unconstitutionality. The government interference which is proscribed by the First Amendment includes all regulations which create a fear of criminal or economic reprisals or otherwise unduly burden the exercise of First Amendment rights. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Talley* v. *California,* 362 U.S. 60 (1960); *Thomas* v. *Collins,* 323 U.S. 516 (1945).

The Florida statute will have a chilling effect on the protected freedom of expression of the press. This Court has consistently invalidated regulatory statutes which, although not directly prohibiting the printing or disseminating of facts and ideas, placed an impermissible burden on the exercise of First Amendment

rights. *E.g., Talley* v. *California, supra; Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Grosjean* v. *American Press Co., supra.*

The editorial and financial burdens placed on the press by section 104.38 have the same inhibiting effect. The statute creates a strong incentive for newspapers to avoid publishing controversial columns, including the presentation of both sides of an issue, or to censor articles for statements which might be interpreted as attacking a political candidate for fear of having to devote (without compensation) equal and equally prominent space to a candidate's reply, over which the newspaper will have no editorial control.

The financial burden placed on the newspaper is also conducive to self-censorship. The statute is in effect an unconstitutional tax, measured according to the type and amount of space which a newspaper allocates to comment adverse to a candidate. *Cf. Grosjean* v. *American Press Co., supra.*

The impact of section 104.38 on marginal or ideologically oriented newspapers may be disastrous. Many of these newspapers cannot afford to print free extra copy. Nor can they afford to eliminate the critical viewpoints which are the basis of their appeal to a select audience. Journals with a recognized political viewpoint, like the *National Review* or the *New Republic,* may lose their readers if they are forced to fill their pages with self-serving responses from criticized candidates. The net effect of the Florida statute may well be to decrease the variety of news sources on which the vigorous public debate contemplated in *New York Times Co.* v. *Sullivan, supra,* depends.

C. Florida Statute § 104.38 Is Unconstitutional as a Prior Restraint on the Press.

The preceding section considered the chilling effect which a prospective right of reply under the Florida statue will have when a newspaper is deciding whether to publish a criticism of a candidate for public office. Quite apart from this chilling effect, once a criticism has already been published the administration of the statutory right of reply necessarily involves a prior restraint. The statutory right of reply pre-empts a newspaper from printing news material of its choice in space equal in quantity and prominence to the space occupied by the previously published criticism. If the space is the lead column on the front page, the newspaper is barred from printing news material of its own choice in the lead column on the front page. If the space is the lead editorial, the newspaper is barred from expressing its own editorial views in the lead editorial space. A restraint of this character is a prior restraint, condemned by *Near* v. *Minnesota, supra; New York Times Co.* v. *United States, supra.*

D. The Standards Which Govern Access to Electronic Media Are Not Applicable to the Print Media.

Section 104.38 bears a resemblance to aspects of the "fairness doctrine" which this Court has upheld as constitutionally permissible regulation of the broadcasting industry. But as both legislative history and the decisions of this Court demonstrate, this doctrine stems from the fact that broadcasting frequencies are a scarce resource whose use must be regulated by the government to prevent chaos. *Red Lion Broadcasting Co.* v. *FCC, supra.* Such considerations have no relevance to newspapers. *Cf. Brandywine-Maine Line Radio, Inc.* v. *FCC,* 473, F2d 16, 54 (D.C. Cir. 1972) (Bazelon, J., dissenting).

Red Lion also reflected this Court's recognition that during the last half century, Congress and the authorized regulatory agency, the Federal Communications Commission, had gained experience and expertise in dealing with the broadcasting industry. The challenged doctrines were the product of this administrative expertise, which was given great weight by the Court. See *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm., supra.*

The Florida statute is even broader in its sweep than congressional legislation[4] regulating the broadcast industry and rules of the FCC under the fairness doctrine. Congress specifically exempted from equal time provisions statements made during newscasts, news interviews, and coverage of bona fide news events. The FCC administratively adopted this exemption for the fairness doctrine. The Florida statute contains no such limitations. The FCC political editorial rule applies only to editorial endorsements of candidates and does not require, as the Florida statute does, that the candidate adversely affected be given equal and equally desirable time to reply.

III. THE VAGUENESS OF FLORIDA STATUTE § 104.38 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Due Process Clause requires that criminal statutes whose prohibitions are not clearly defined be struck down as void for vagueness. *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972); *Cramp* v.

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[4] Section 315(a) of the Communications Act of 1934, 47 U.S.C. § 315(a) requires licensees who permit one candidate to use their stations to afford equal opportunities to other candidates for the same office.

Board of Public Instruction, 368 U.S. 278 (1961). Where First Amendment rights are at stake, vague laws are particularly suspect, since their effect may be to chill activities beyond the unlawful zone. *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966).

The Florida statute is a criminal statute, although it was applied below in a civil proceeding. The terms of the statute are unconstitutionally vague in at least two significant ways:

—The statute covers "newspapers", but provides no guidance as to what this term includes beyond daily journals of general circulation. Are magazines and other periodicals covered?

—The prohibition against comments which "assail" the personal character of candidates is subject to completely subjective determinations as to the meaning of "assail".

Provisions this vague cannot satisfy the Due Process Clause. See, *e.g., Coates* v. *Cincinnati,* 402 U.S. 611 (1971).

IV. FLORIDA STATUTE § 104.38 IS AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

By requiring that a newspaper publish without compensation the reply of a candidate, Florida Statute § 104.38 takes private property unconstitutionally. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). The newspaper's columns are its own private property. If, for public purposes, a state takes this space, which has substantial economic value, it must compensate the newspaper accordingly. This is particularly true

as newspapers find economic survival increasingly difficult. Section 104.38 authorizes takings without compensation, in violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this case.

Respectfully submitted,

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